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MEMBER, WORLD FEDERATION OF ADVERTISERS

Before the

FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:

Limitations on Commercial Time on Television Broadcast Stations) MM Docket No. 93-254

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Federal Communications Commission
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The Association of National Advertisers, Inc. (A.N.A.) appreciates this opportunity to respond to a Notice of Inquiry (MM Docket No. 93-254) by the Federal Communications Commission (FCC) which asks "whether the public interest would be served by establishing limits on the amount of commercial matter broadcast by television stations."

This Inquiry raises fundamental issues about the role advertising plays in the media and our nation's economy. A.N.A. strongly believes that commercial time limits would not serve the public interest. Consumer choice and economic forces should be relied upon to ensure the appropriate balance between programming and advertising, rather than government regulation through arbitrary time restraints.

A.N.A., the industry's oldest trade association, is the only organization exclusively dedicated to serving the interests of corporations that advertise regionally and nationally. The Association's advertiser membership is, in composite, a cross section of American industry. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a variety of goods and services and collectively account for over 80 percent of all annual regional and national advertising expenditures in the United States. Therefore, A.N.A. is deeply concerned about issues affecting the broadcast advertising marketplace and would oppose governmental mandates restricting the amount of commercial time permitted on the broadcast airwaves.

The Role of Advertising

The Association believes that it is appropriate for the Commission to examine from time to time the regulatory structure affecting broadcasting to determine whether this structure is meeting the needs of the public, broadcasters and advertisers and thereby furthering "the public interest." It is particularly appropriate for advertising to be included in this review because advertising is crucial to the well-being of the broadcast industry, particularly over-the-air stations which derive 100 percent of their revenue from advertising.

Advertising also plays an increasingly important role in the proliferating media options which have developed in recent years. Advertising dollars spent on cable television, for example, have continued to grow sharply in recent years, to a level of $3.5 billion in 1992, up nearly $1 billion since 1990, as reported in *Cable TV Advertising.*

Advertising not only serves as the economic foundation for all the news, entertainment, and other programming on broadcast television but also provides highly valuable information to consumers in its own right. A 1990 study conducted by two Nobel Laureates in Economics, Dr. Kenneth J. Arrow and the late Dr. George G. Stigler, for the economic consulting firm Lexecon Inc., concluded:

> Advertising is a powerful tool of competition. It provides valuable information about products and services in a cost-effective manner. In this way advertising helps the economy to function smoothly -- it keeps prices low and facilitates the entry of new products and new firms into the market.

The United States Supreme Court in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) also described the positive contribution advertising makes to the proper functioning of our economy:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of information is indispensible. . . As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.

Thus, advertising performs a dual role, as the economic foundation of the media and as a source of valuable information for businesses and consumers.

Commercial Levels Should Be Regulated By Market Forces

As a policy matter, A.N.A. believes that it is essential that advertisers, program producers and broadcasters be given the flexibility to best determine how to balance the entertainment needs of the audience with the financial requirements of quality programming. These needs necessarily will vary over time and with different program formats. The government should not establish arbitrary time limits which will operate as an economic straightjacket.

There are a number of market forces that effectively work to determine the appropriate level of advertising. The first and most obvious constraint is the time required for the programming itself in order to ensure that it attracts a significant audience. Another factor is the advertiser's need for an effective environment for its advertising. Advertisers will seek to avoid a media environment in which too much advertising in a program effectively prevents any commercial from distinguishing itself and reaching the consumer. It is in the direct financial interest of both the advertiser and the broadcaster to avoid an overly cluttered commercial environment.

Finally, advertisers and broadcasters are very sensitive to the increasingly competitive media environment. There are already more viewing options available through the growth of cable television and many more cable options and other broadcast options are just on the horizon. In addition, there has been an explosive growth in video cassette rentals, video games, home computing and computer games, on-line information services and other forms of home entertainment which were unthought of only a few short years ago. Viewers have more options for other forms of home entertainment and information than ever before. Also, all advertisers and broadcasters live under the "tyranny of the remote control", which gives the viewer instantaneous discretion over what appears on the television screen.

These market and technological forces continue to work to determine the appropriate level of advertising for different time periods and different types of programming. We submit that the market, controlled by viewer choice, not the government, is best able to determine the appropriate balance. An arbitrary, one-size-fits-all time constraint would put the Commission in the position of micromanaging the broadcast industry. It would restrict the ability of advertisers, program producers and broadcasters to respond to the marketplace and the public they serve.

Recent Trends Provide More Choices for Advertisers and Consumers

The projected development of the so-called "Information Superhighway" will provide more choices for both advertisers and consumers. According to A.C. Nielsen Co., 62.4 percent of television households subscribe to basic cable television and 98 percent of homes are passed by cable. In addition, 59.8 percent of total subscribers to cable television receive 30-53 channels, according to the *Television & Cable Factbook.* As the Commission is well aware, it is widely predicted that there is soon to be a further proliferation of information and entertainment channels entering the home via 500-channel cable systems, digital broadcast satellite transmission, and other emerging technologies.

It can be expected that the levels of commercial matter which will enter the home via these channels will vary greatly. Some channels will resemble today's broadcast media which carry a mixture of programming and commercials. Others will resemble public broadcasting stations and specialized cable channels which carry no commercials. Still others will resemble today's home shopping channels or will serve as video catalogues of goods and services.

All of these developing media systems operate as another market restraint on the level of commercialization on broadcast stations.

Commercial Time Limits Would Be Counterproductive

As the Commission considers options under this inquiry, it is important to note that commercial time is an extremely expensive commodity. Published cost figures for network commercial prime time average over $150,000 per thirty second spot. These costs escalate dramatically for special events such as the Super Bowl or other highly rated programming. While some might theoretically wish to have limits on commercial time imposed by the government, the practical effect of such limits would almost certainly cause the price of an artificially scarce commodity, commercial time, to rise, regardless of any other market conditions.

This in turn would increase the marketing costs of existing and new products and would reduce the amount of money available to develop and market new products. The impact from such a result ultimately would be felt on profits and economic growth. Arbitrary time limits on advertising would increase the cost of marketing goods and services without providing any socially useful purpose.

The increased advertising costs that would result from commercial time limits could weaken the quality and quantity of programming available on broadcast stations. Advertisers have a finite amount of resources to spend on marketing. The increased price of broadcast time plus the broad range of other media options available would provide a tremendous incentive for advertisers to move to other forums. By undermining the economic foundations of the broadcast industry, arbitrary commercial time limits could thus endanger the quality and quantity of programming.

Constitutional Protections for Commercial Speech

A.N.A. believes that arbitrary commercial time limits also raise serious First Amendment concerns. The U.S. Supreme Court has made it clear that truthful, nondeceptive commercial speech cannot be restricted or proscribed unless the restriction "directly advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest. (See Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) and Board of Trustees of the State University of New York v. Fox, 109 S.Ct. 3028 (1989)). A.N.A. does not believe that arbitrary commercial time limits would advance any "substantial governmental interest."

In his Separate Statement, Chairman Quello cited the most recent commercial speech case, City of Cincinnati v. Discovery Network, Inc., 61 U.S.L.W. 4272 (March 24, 1993). In that case, the Supreme Court strongly reaffirmed the substantial burden that the government must bear when it attempts to ban or restrict truthful, nondeceptive commercial speech. Further, the Court acknowledged the important role that commercial speech plays for the economy and the individual consumer.

A.N.A. believes that commercial time limits would not meet the First Amendment standards enunciated by the Supreme Court. It is difficult to envision any "substantial governmental interest" that would be "directly advanced" by a commercial time limit. On what basis could such a time limit be proposed, other than an arbitrary decision that there is "too much" advertising on the broadcast media and that "X" minutes is the appropriate balance? Outside of the competitive market system, is there any reason to believe that a government agency could arrive at a "magic" or "perfect" number of minutes of advertising that should appear on broadcast programming? Anything short of such a "perfect" calculation by the government would not be "narrowly tailored" to "reasonably fit" the government's interests.

As noted, the Supreme Court has held that commercial speech provides valuable information to consumers and is entitled to substantial First Amendment protection. The effect of a commercial time limit would be to choke off speech and suppress valuable information.

Conclusion

A.N.A. strongly believes that establishing commercial time limits would not serve the public interest. Market forces, not the government, should determine the appropriate balance between commercials and programming on the broadcast media.

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